FILE COPY

FILED
APR 2
CHARLES ELM

NO. 454

IN THE SUPREME COURT OF THE UNITED STATES

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, C. C. CHILDERS, FRED CAPSHAW and E. R. HUGHES, Constituting the Corporation Commission of the State of Oklahoma, and FARMERS UNION CO-OPERATIVE GIN COMPANY, *Appellants*,

vs.

WILLIAM LOWE, Doing Business Under the Name of the Capitol Hill Gin Company, *Appellee*.

Appeal From the District Court of the United States for the Western District of Oklahoma.

BRIEF OF APPELLEE

ROBERT M. RAINEY,
STREETER B. FLYNN,
ALGER MELTON,
Attorneys for Appellee.

RAINEY, FLYNN, GREEN & ANDERSON,
MELTON & MELTON,
Of Counsel.

Utterback Typesetting Co., Law Brief Printers, 17 S. Walker, Oklahoma City, 3-8710

SUBJECT INDEX

	Page
Statement	1
Final Decre	2
Argument Sustaining Decree	6
Act in Violation of Equal Protection Clause	7
Conclusion	19

AUTHORITIES CITED

Compiled Oklahoma Statutes 1921:

Article 40, Chapter 7, as amended by Chapter 191, Session Laws 1923	3
Section 3712, Chapter 20 of Article 4	4
Sections 3712 to 3718, inclusive	7
Article 19, Chapter 34 (par. 5637, et seq.)	6
Article 19, Chapter 34, as amended by Chapter 167, Session Laws 1923	5
Article 4, Chapter 20, as amended by Chapter 191, Session Laws 1923	6
Section 5648	8
Articles 2, 3 and 4, Chapter 34	9
Section 170	12
Section 5651	15
Paragraph 5608	17
Article 19, Chapter 34 (par. 5599 et seq.)	7
Amendment of 1925 to Section 3714	16
Section 3712 (Session Laws 1915)	7
Section 3713, as amended by Chapter 191, page 340, Session Laws 1923	i
Section 3714 (Session Laws 1915, as amended by Section 1, Chapter 109, page 157, Session Laws 1925)	i
Section 3715, as amended by Section 3, Chapter 191, Session Laws 1923	3
Sections 3716, 3717 and 3718 (Session Laws 1915)	4
Section 5637, as amended by Chapter 167, Session Laws 1923	4
Section 5651	5
Section 5652	5

Airway Corp. v. Day, 266 U. S. 71, 85	10
American Sugar Rfg. Co. v. Louisiana, 179 U. S. 89	17
Birmingham Water Co. v. Brown, 67 So. 613	11
Fletcher Cyc. Corp. (1924 Supp.), Sec. 4498, p. 1099	12

	Page
Frost v. Corp. Com., 278 U. S. 515	7
Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150, 155	10
Interstate C. C. v. T. & P. R. Co., 52 Fed. 187	12
Kentucky Corp. v. Paramount Exch., 262 U. S. 544, 550	10
Louisville Gas Co. v. Coleman, 277 U. S. 32, 37	10
Mencho v. Ward, 27 Fed. 529	12
Messenger v. Penn. R. Co., 37 N. J. 407	11
Messenger v. Penn R. Co., 8 Vroom (N. J.) 531	11
Quaker City Cab Co. v. Penna., 277 U. S. 389, 400	10
Royster Guano Co. v. Virginia, 253 U. S. 412, 415	10
Salisbury & S. Ry. Co. v. Southern Power Co., 105 S. E. 28 (N. C.)	12
Schlesinger v. Wisconsin, 270 U. S. 230, 240	10
St. Paul Book & Stationery Co. v. St. Paul Gaslight Co. et al., 153 N. W. 262	12
Shaffer Oil & Refining Co. v. Creek County Gas Co. et al., 114 Okla. 258	13
Warehouse Co. v. Tobacco Growers, 276 U. S. 71	17
Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92	13
Wright v. U. S., 167 U. S. 512	13
Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522	18

NO. 454

IN THE SUPREME COURT OF THE UNITED STATES

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, C. C. CHILDERS, FRED CAPSHAW and E. R. HUGHES, Constituting the Corporation Commission of the State of Oklahoma, and FARMERS UNION CO-OPERATIVE GIN COMPANY, *Appellants*,

vs.

WILLIAM LOWE, Doing Business Under the Name of the Capitol Hill Gin Company, *Appellee*.

Appeal From the District Court of the United States for the Western District of Oklahoma.

BRIEF OF APPELLEE

Statement

On account of the brevity of the statement of the case by appellants we desire to add the following:

This is an appeal from a final decree of a three-judge court convened pursuant to Section 380 of the Judicial Code, permanently enjoining the Corporation Commission of Oklahoma from issuing a license to the appellant, Farmers Union Co-operative Gin Company, to construct and

operate a cotton gin at Packingtown, Oklahoma, and enjoining the gin company from constructing and operating said gin in competition with appellee's cotton gins at Capitol Hill and Wheatland, Oklahoma (R. 23, 24).

The three-judge court consisted of John H. Cotteral, Circuit Judge; John C. Pollock, District Judge, and Edgar S. Vaught, District Judge. There was no written opinion, but the final decree was signed by all of the judges sitting, and is as follows:

"FINAL DECREE—Filed June 22, 1929.

"This cause coming on to be heard upon the application of the plaintiff for a temporary injunction, pursuant to assignment and notice, it is thereupon agreed by counsel for the parties that the cause be also submitted for final decree; and on consideration of the pleadings, stipulation of facts and the arguments of counsel, it is by the court ordered, adjudged and decreed:

"That the defendant, the Corporation Commission of the State of Oklahoma, be and it is hereby perpetually enjoined from issuing a license to the Farmers Union Co-operative Gin Company, a public utility in the State of Oklahoma, to conduct or operate a cotton gin at Packingtown, within or without the corporate limits of the City of Oklahoma, State of Oklahoma, for and upon the ground that by the laws of said state, applicable to said company, said company is required to apportion and pay a part of its net earnings to its members ratably upon the amounts of the products sold to the corporation by its members, and the amounts of the purchases of members from the said company, and its directors are authorized, if so provided by its

by-laws, to apportion such earnings and profits to non-members upon the amounts of their purchases and sales from or to said company, and that such requirements upon and privileges of said company, constitute an unreasonable and arbitrary discrimination in competitive ginning business and operations in favor of the said company and against the plaintiff, and would if said license be issued, effect a denial to the plaintiff of the equal protection of the laws, in violation of the Constitution of the United States.

"That the costs of this suit be taxed to and against the defendants.

"To said decree and every part thereof the defendants, and each of them, at the time duly excepted and except.

"Dated June 22, 1929" (R. 23, 24).

The case was submitted upon an agreed statement of facts, which summarized is as follows (R. 21, 22, 23).

That William Lowe is engaged in the business of ginning cotton at Capitol Hill, which is a portion of Oklahoma City, Oklahoma; that he is also engaged in ginning cotton at Wheatland, some ten or twelve miles southwest of Oklahoma City; that the gins owned and operated by complainant are operated under a license duly issued by the Corporation Commission of the State of Oklahoma, under the terms and provisions of Article 40, Chapter 7, Compiled Oklahoma Statutes 1921, as amended by Chapter 191, Session Laws of Oklahoma 1923; that C. C. Childers, Fred Capshaw and E. R. Hughes are the elected, qualified and acting members of the Corporation Commission of the

State of Oklahoma, and that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00; that the Farmers Union Co-operative Gin Company is a domestic corporation of the State of Oklahoma, organized pursuant to and under Article 19 of Chapter 34, C. O. S. 1921.

That Section 3712, Chapter 20, of Article 4, C. O. S. 1921, declares cotton gins to be public utilities and their operation in the ginning of seed cotton to be a public business; that the Corporation Commission, pursuant to the authority contained in said statute, has promulgated rates and charges for the ginning of seed cotton, applicable to all engaged in the cotton ginning business for the general public; that on the 8th day of March, 1929, the Farmers Union Co-operative Gin Company filed its application with the Corporation Commission for license to operate a cotton gin at a point known as Packingtown, Oklahoma, which is a part of Oklahoma City, and about two and one-half miles from complainant's gin located at Capitol Hill, Oklahoma City, and that the gins owned and operated by complainant, and the proposed gin to be located at Packingtown, would serve the same general cotton producing territory, and will be in competition for the ginning of cotton grown in such territory; that subsequent to the filing of the application by the Farmers Union Co-operative Gin Company for a gin license authorizing it to construct, maintain

and operate a cotton gin at Packingtown, complainant filed its written objection and protest against the granting of said license, alleging that same was not a needed utility, and that the Farmers Union Co-operative Gin Company being organized under the provisions of Article 19, Chapter 34, C. O. S. 1921, as amended by Section 167, Session Laws 1923, is not authorized to be a public utility and to engage in the business of ginning seed cotton under the cotton gin act, and alleging that the issuance of a license to the Farmers Union Co-operative Gin Company to operate its gin as a public utility would result in discrimination and class legislation in favor of applicant and against protestant; that the Corporation Commission has heard the application of the Farmers Union Co-operative Gin Company for said license, as well as the objection and protest of complainant William Lowe, and will, unless restrained and enjoined, issue the license prayed for, authorizing the establishment and operation of a gin at Packingtown.

ARGUMENT

Article 19, Chapter 34, Compiled Oklahoma Statutes 1921, as construed and applied by the Corporation Commission of Oklahoma, as authorizing the Farmers Union Co-operative Gin Company to engage in the business of ginning seed cotton as a public utility under the Cotton Gin Public Utility Act (Sections 3712 to 3718, C. O. S. 1921), denies the complainant the equal protection of the law and due process of law in violation of and contrary to the Fourteenth Amendment to the Constitution of the United States.

The appellants in their assignments of error (R. 25, 26) complain of the decree of the three-judge court in holding that Article 19, Chapter 34, C. O. S. 1921, as amended by Chapter 167 of the Session Laws of Oklahoma 1923, is unconstitutional and void as construed and applied by the Corporation Commission of the State of Oklahoma.

Appellee asserts the correctness of the holding and the validity of the decree.

The statute passed in 1919 (Article 19, Chapter 34, Compiled Statutes 1921, par. 5637, *et seq.*), as construed and applied by the Corporation Commission, authorizes the respondent company to engage in the business of ginning seed cotton as a public utility under Article 4, Chapter 20, Compiled Oklahoma Statutes 1921, as amended by Chapter 191, Session Laws of 1923.

The principles of law governing this case have recently been clearly enunciated by this Court in the case of

Frost v. *Corporation Commission*, 278 U. S. 515.

The cases are alike in that complainants in each operate cotton gins duly licensed by the Corporation Commission under the Cotton Gin Public Utility Act (Sections 3712 to 3718, inclusive, Compiled Statutes 1921), and in that the respondents, co-operative corporations, were organized pursuant to and under the provisions of Article 19, Chapter 34 (Compiled Statutes 1921, par. 5637, *et seq.*), commonly called the Act of 1919, as distinguished from purely co-operative corporations authorized by an Act of the State Legislature passed in 1917 (Compiled Statutes 1921, par. 5599, *et seq.*). In the Frost case it was contended and this Court held, that an amendment to Section 3714 of the Cotton Gin Utility Act made by the Oklahoma Legislature of 1925, which permitted a corporation organized under the 1919 Act to establish a gin by the presentation of a petition signed by one hundred citizens and taxpayers of the community where the gin was to be located, denied complainant the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States, since he could only secure a gin license or permit by showing that his gin was a needed utility.

It is here contended that the 1919 Act (Compiled Statutes 1921, par. 5637, *et seq.*), as construed and applied by the Corporation Commission as authorizing a corporation organized under that Act to engage in the public utility

business, denies complainant the equal protection of the laws, because it permits, and in fact, compels, such corporation to conduct its business on more favorable terms than complainant is permitted to under the law.

Section 5648, Compiled Oklahoma Statutes 1921, of the Act passed in 1919, provides:

> "The directors, subject to revision by the stockholders, at any general or special meeting lawfully called, shall apportion the net earnings and profits thereof from time to time at least once in each year in the following manner:
>
> "(1) Not less than ten per cent thereof accruing since the last apportionment shall be set aside in a surplus or reserve fund until such fund shall equal at least fifty per cent of the paid-up capital stock.
>
> "(2) Dividends at a rate not to exceed eight per cent per annum, may, in the discretion of the directors, be declared upon the paid-up capital stock. Five per cent may be set aside for educational purposes.
>
> "(3) The remainder of such net earnings and profits shall be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members, and the amounts of the purchases of members from the corporation; provided, that if the by-laws of the corporation shall so provide the directors may apportion such earnings and profits in part to non-members upon the amounts of their purchases and sales from or to the corporation."

The three-judge court held that the above mandatory provisions under which the respondent gin company must carry on its business unconstitutionally discriminates against complainant and corporations organized un-

der general law (Articles 2, 3 and 4, Chapter 34, Compiled Statutes 1921) engaged in ginning seed cotton as public utilities. If the respondent gin company is granted a license and permitted thereunder to construct and operate a gin in Packingtown, Oklahoma, it will carry on its business under more favorable terms than complainant and corporations not organized under the general statute, since it will be compelled, although engaged in a regulated public business as a public utility, to grant refunds and rebates to its patron members and will have the right and privilege of making such refunds and rebates to non-member patrons upon the amount of their patronage.

Appellee, William Lowe, is prohibited from making refunds and rebates, and is compelled, in the performance of his public duty, to charge rates fixed by the Corporation Commission, which will compel him to compete with appellant gin company upon unequal terms and under a greater burden than is imposed upon appellant gin company. Should appellee attempt to charge lesser rates for ginning seed cotton than those prescribed by the Corporation Commission, he would subject himself to heavy fines and penalties provided for the violation of the Commission's orders and established rates, and would also, by charging less than the prescribed rate, or by rebating or refunding a portion of the charge made, violate the laws and public policy of the State of Oklahoma.

We think the principles announced in the Frost case are decisive in this case, for it was there held:

> 1. "The purpose of the clause in respect to equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 37. This Court has several times decided that a corporation is as much entitled to the equal protection of the laws as an individual. *Quaker City Cab Co.* v. *Penna.,* 277 U. S. 389, 400; *Kentucky Corp.* v. *Paramount Exch.,* 262 U. S. 544, 550; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150, 154. The converse, of course, is equally true. A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case the classification, in order to be valid, 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415; *Airway Corp.* v. *Day,* 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 240. That is to say, *mere* difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150, 155; *Louisville Gas Co.* v. *Coleman, supra,* p. 37."

A corporation organized under the 1919 Act. if granted a license to operate a gin, will be doing the same business for the general public and to the same end, namely, that of reaping profits—that is, with reference to the business in which it will be engaged it will be in exactly the same situation as appellee.

So in this case, William Lowe and the Farmers Union Co-operative Gin Company will be similarly situated in carrying on their public utility business of ginning seed cotton at rates prescribed by the Corporation Commission, and to permit the appellant gin company to carry on its business with privileges not accorded the appellee would violate the equal protection clause.

The 1919 Statute, as construed and applied by the Corporation Commission, sanctions an unjust discrimination between the business of respondent corporation and the business of complainant and others similarly situated.

It is well founded in the public policy of the State of Oklahoma, and of the United States, that a public utility is required to treat all customers similarly situated alike in every respect, and an order of the Commission conflicting with this principle is void.

St. Paul Book & Stationery Co. v. *St. Paul Gaslight Co. et al.*, 153 N. W. 262.

Western Union Tel. Co. v. *Call Pub. Co.*, 181 U. S. 92.

Birmingham Water Co. v. *Brown*, 67 So. 613.

Messenger v. *Penn. R. Co.*, 37 N. J. 407.

Messenger v. *Penn R. Co.*, 8 Vroom (N. J.) 531.

Fletcher Cyc. Corp. (1924 Supp.), Sec. 4498, p. 1099.

A public utility cannot discriminate among its cus-

tomers, and, in justification of its unlawful acts, rely upon competition as an excuse.

Interstate C. C. v. *T. & P. R. Co.*, 52 Fed. 187.
Wright v. *U. S.*, 167 U. S. 512
Mencho v *Ward*, 27 Fed. 529.

The proposition that a public utility, whether it be a railroad, gas, water or electric company, must treat all customers similarly situated alike in every respect is so well settled in the law that it is axiomatic.

We quote from a few of the authorities.

In *St. Paul Book & Stationery Co.* v. *St. Paul Gaslight Co. et al.*, 153 N. W. 262, the Court said:

> "We doubt not, the conditions being the same, the price must also be the same. Favoritism in a public service corporation towards some of its patrons, is not tolerated at all."

In Fletcher on Corporations (1924 Supp.), Sec. 4498, p. 1099, it is said:

> "A public service commission having power and authority to fix rates has *no power* to authorize a public service corporation to make unjust discriminations in rates charged consumers for the same or similar service."

See, also:

Salisbury & S. Ry. Co. v. *Southern Power Co.*, 105 S. E. (N. C.) 28.

The common law is in force in Oklahoma. Section 170, Compiled Oklahoma Statutes 1921, reads as follows:

"Force of Common Law. The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object."

In the case of *Shaffer Oil & Refining Co.* v. *Creek County Gas Co. et al.*, 114 Okla. 258, the Supreme Court of Oklahoma recognized that the common law rule against discriminations was in full force and effect, and cited with approval, among other cases, the case of *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U. S. 92.

This 1919 statute as construed and applied by the Commission creates two distinct discriminations; one between the cotton producing patrons who will patronize the appellant gin company as a public utility, and the other between said public utility and the appellee. Under the principles governing public utility law, all the cotton producing patrons of the utility are entitled to the ginning service furnished by appellant at the same rates and on the same terms. The statute does not permit apportionment of the earnings to the members of the corporation upon the amount of stock held by said members in the corporation, but upon the amount of patronage, or business, done by the members with the corporation. For illustration, the ap-

pellant company's capital consists of two thousand shares of the par value of $5.00 per share, and if a patron member of the corporation owned only one share, but ginned three hundred bales of cotton with the corporation out of a total of fifteen hundred bales ginned by said corporation in any one season, he would be entitled to one-fifth of the earnings of the corporation after the eight per cent dividend is paid him and other members on their stock. This would result in materially reducing the price of ginning to him, depending upon the amount of the earnings of the corporation, and would have no relation to the amount or number of shares of the capital stock owned by said member. Another cotton producer similarly situated may gin exactly the same amount of cotton with the corporation, and he would not be entitled to any rebate or apportionment of the earnings, unless the corporation had so provided in its by-laws, which it is not required to do and almost universally does not do. This discrimination is apparent, as one cotton producer would receive the public service for a much lesser charge than the other.

We realize that this is a discrimination of which the appellee, Lowe, cannot complain, except as it affects him. It does not materially affect him. He is not permitted to make these rebates, refunds or apportionments of earnings to his patrons, and although he and the respondent company are similarly situated, and are engaged in the

same business of ginning seed cotton of all producers at the same rate fixed by the Commission, he cannot hold out to the cotton producers as an inducement to patronize his gin that they will receive any rebate or refund; this he is prohibited from doing by the public utility law.

The obvious and natural result is that the cotton producer, whether a member or non-member of the appellant company's corporation, will have every inducement to patronize appellant's gin with the hope, and prospect, that he will receive this rebate or refund, and thereby reduce the price of his ginning below the rate prescribed by law.

It is also a well known fact that there is great and widespread sentiment among farmers to patronize farmers' co-operative organizations. The statute authorizes the appellant corporations and others organized under the 1919 Act to use the word co-operative as a part of the name of the corporation, and prohibits all other corporations from using said name. Section 5651. If the 1919 corporate organizations were truly co-operative there would be no objection to this. This is a great privilege that the appellant corporation enjoys, having as its natural result immense power in drawing the patronage of cotton producing farmers, which privilege is not accorded appellee. There would be no objection to this if the 1919 corporations were purely co-operative and ginned cotton for their members only, but, as held in the Frost case, they are not purely co-operative

organizations, as they will be engaged just like the appellee is in a public service and for the purpose of making money.

It is therefore evident that the appellant corporation has a great privilege that is denied the appellee and that impediments are placed in the way of appellee in conducting his business that are not placed in the way of the appellant corporation similarly situated with respect to its public service.

It is inferentially contended by appellants that the granting of the injunction to the appellee in this case has the effect of striking down the 1919 co-operative statute, which, it is stated, has been adopted in substance in thirty-two States. We do not agree with this contention. The statute is unassailable as applied to ordinary industrial or agricultural organizations other than public utilities. If the Commission had construed the statute as not applying to a public utility (that is, as not authorizing a corporation organized under the statute to engage in the public utility business) we would have no complaint in this case, and possibly that would have been the proper construction of the statute. But appellee's right to an injunction in this case must depend upon the construction and application of the statute as made by the Commission.

For illustration, the Amendment of 1925 to Section 3714, Compiled Oklahoma Statutes 1921 (the Cotton Gin

Public Utility Statute) would doubtless have been sustained in the Frost case if the Corporation Commission and the Supreme Court of Oklahoma had applied it only to purely co-operative corporations authorized by the 1917 statute, for in the opinion this Court said:

> "It is important to bear in mind that the Durant company was not organized under the Act of 1917, but under that of 1919. The former authorizes the formation of an association for mutual help, without capital stock, not conducted for profit, and restricted to the business of its own members, except that it may act as agent to sell farm products and buy farm supplies for a non-member, but as a condition may impose upon him a liability, not exceeding that of a member, for the contracts, debts and engagements of the association, such services to be performed at the actual cost thereof, including a pro rata part of the overhead expenses. Comp. Stats. 1921, par. 5608. Under this exception, the difference between a non-member and a member is not of such significance or the authority conferred of such scope as to have any material effect upon the general purposes or character of the corporation as a mutual association. As applied to corporations organized under the 1917 Act, we have no reason to doubt that the classification created by the proviso might properly be upheld. *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89; *Warehouse Co.* v. *Tobacco Growers,* 276 U. S. 71."

Counsel for appellants (pp. 6 to 11 of their brief) discuss teh case of the *Farmers Mercantile & Elevator Co.,* 130 Minn. 199, 164 N. W. 804, in which the Supreme Court of Minnesota sustained a statute of that State authorizing a co-operative association to provide by its by-laws for the distribution of profits and earnings on a patronage basis,

as against the contention of a stockholder that such profits and earnings should be distributed solely to the stockholders in proportion to the amount of stock held by them. In our opinion the case falls short of sustaining, or even having any persuasive effect on the question presented in this case, for the reason that the mercantile and elevator company was not carrying on its business in Minnesota as a public utility. We do not overlook the contention of counsel for appellants (page 11) that a business "is a public utility in law if it is a public utility in fact, and the declaratory statute of the Legislature cannot and does not change the fact." This language is not an accurate statement of the governing principle, as we understand it. As to whether any business is a public utility depends upon the facts and not upon the legislative fiat, which at most is only persuasive. *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522.

The nature of the business and the method of conducting the same by the mercantile and elevator company under consideration in the Minnesota case might have justified the Legislature in declaring it a public utility and regulating it as such, but no such statute existed, and this, we think, was essential. Moreover, no right was asserted under the Constitution of the United States in that case by a person or corporation against another person or corporation engaged in the same business.

CONCLUSION

All that appellee is seeking to do is to require appellant, in order to engage in the ginning business, to either organize under the provisions of the 1917 Act or to organize as an ordinary corporation under the general incorporation statutes of the State. If the former course is pursued, the co-operative corporations will not be public utilities in the true sense, as they will only perform the service of ginning seed cotton for their members. If the latter course is followed, they cannot practice discrimination, nor can they exercise the privileges made mandatory by the 1919 Act, but will be compelled to compete with appellee upon equal terms. This is obviously fair and just.

We respectfully submit that the decree of the United States Court is right and should be affirmed.

ROBERT M. RAINEY,
STREETER B. FLYNN,
ALGER MELTON,
Attorneys for Appellee.

RAINEY, FLYNN, GREEN & ANDERSON,
MELTON & MELTON,
Of Counsel.

APPENDIX

OKLAHOMA STATUTES

Article 19. Co-operative Corporations.

Section 3712, C. O. S. 1921 (Sess. L. 1915):

"Cotton Gins—Declared Public Utility. That cotton gins are hereby declared to be public utilities, and the operation of same for the purpose of ginning seed cotton is declared to be a public business."

Section 3713, C. O. S. 1921 (as amended Ch. 191, p. 340, Sess. L. 1923):

"Cotton Gins—License. 1. No person or persons, or corporation in this State, shall be permitted to maintain and operate a gin for the purpose of ginning seed cotton without first having secured a license for such purpose from the State Corporation Commission, said license to be issued upon proper showing to be made as prescribed by the rules and regulations promulgated by the Commission. The fee for said license issued by the Corporation Commission is hereby fixed at three (3c) per bale, based on the number of bales ginned the previous year as shown by the final report of said gin on file with the Corporation Commission. In case of a new plant or a gin that did not operate the preceding year, a license fee of five dollars ($5.00) per gin stand will be charged, which sums shall be converted into the State Treasury of the State of Oklahoma."

Section 3714, C. O. S. 1921 (Sess. L. 1915, as amended by Sec. 1, Ch. 109, p. 157, Sess. L. 1925):

"Corporation Commission—Licenses. 1. The Corporation Commission, in issuing such license, shall

have the right to take into consideration the necessity for the operation of a gin for such purpose at the place of its location; provided nothing herein shall operate to prevent the licensing of gins now established, except for violation of the provisions of this act or of the rules, regulations and requirements of the Corporation Commission made and promulgated pursuant to this Act. No new gin plants shall be constructed, installed or licensed, or any old gin removed from one point to another until satisfactory showing shall have been made to the Corporation Commission setting forth that such gin is a needed utility, and that the proposed corporation, company, firm or individual is a competent and desirable corporation, company, firm or individual to establish and operate said gin as may appear in the discretion of said Commission; provided, that on the presentation of a petition for the establishment of a gin to be run co-operatively, signed by one hundred (100) citizens and taxpayers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin. The Commission shall have the right to take into consideration the responsibility and reliability and qualifications as well as the capacity of the person or persons or corporation to do such ginning business so far as to afford all reasonable facilities, conveniences and services to the public, and shall have the power and authority to require such facilities, conveniences and services to be afforded the public. The inspectors provided herein shall be men who have served at least three years in practical and actual gin operation and shall be appointed by the Corporation Commission; that said inspectors shall have the power to make recommendations to the Commission as to the opening or closing of any gin or gins as well as to the affording by such gins of the reasonable facilities, conveniences and services to the public hereinbefore authorized to be required, as well as to make such other reports and recommendations to the Corporation Commission as may,

to said inspectors, appear necessary, reasonable and just."

Section 3715, C. O. S. 1921, as amended by Sec. 3, Ch. 191, Session Laws 1923:

"Same—Power and Authority.

"Section 3. That Section 3715, Compiled Oklahoma Statutes 1921, be, and the same is, hereby amended to read as follows, to-wit: (Sec.) 3715. That the Corporation Commission shall have the same power and authority and be charged with the duty of regulating and controlling such cotton gins in all matters relating to the performance of public duties and the charges therefor, and correcting abuses and preventing unjust discrimination and extortion, as is exercised by said Commission as to transportation and transmission companies, and shall have the same power to fix rates, rules, charges and regulations to be observed by such person or persons or corporation, operating gins and the affording of all reasonable conveniences, facilities and services as it may impose as to transportation or transmission companies. For the purpose of carrying into effect the provisions of this Act, there is hereby created a department of cotton gin utilities under the Corporation Commission. The Commission shall appoint four inspectors of cotton gins, one of whom shall be selected as head of such department, who shall receive a salary of two thousand dollars ($2,000.00) per annum, whose functions, duties and term of office shall be regulated at the discretion of the Commission. There is also provided a stenographer for such Commission, who shall receive a salary of twelve hundred dollars ($1,200.00) per annum. The fiscal year of all cotton gin utilities shall terminate March 31, 1924, and annually each year thereafter, and it shall be the duty of each and every corporation, company, firm or individual owning or operating a cotton gin to file a final

report for the preceding year not later than 30 days following the expiration of said fiscal year. Failure to file said report shall constitute a forfeiture of license and is hereby declared to be a misdemeanor and may be prosecuted as such. Said report to be in accordance with rules and regulations promulgated by the Commission from time to time."

"3717. Regulations—Enforcement of Orders. That in all matters pertaining to the regulation and control of gins and ginning and the business of such, the Commission shall have the same power and authority as is now exercised by it under the law as to any matter pertaining to the public visitation, regulation or control of transportation and transmission companies, and may enforce its orders against any person, firm, company or corporation maintaining or operating a gin or gins, by imposing a fine against them, or either of them, not exceeding $100.00 for the violation of any of its orders."

Article 4. Cotton Ginners and Dealers.

Section 5637, C. O. S. 1921 (as amended by Chapter 167, Session Laws of 1923):

"Corporations Authorized—Purposes. Ten or more persons may form a corporation for the purpose of conducting an agricultural, dairy, livestock, irrigation, horticultural, mercantile, mining, manufacturing, mechanical, or industrial business upon a co-operative plan, and with their associates, successors and assigns may become and be a body politic and corporate by complying with the provisions of this Act."

Section 5648, C. O. S. 1921:

"Dividends and Profits—Reserve Fund. The directors, subject to revision by the stockholders, at any general or special meeting lawfully called, shall appor-

tion the net earnings and profits thereof from time to time at least once in each year in the following manner:

"(1) Not less than ten per cent thereof accruing since the last apportionment shall be set aside in a surplus or reserve fund until such fund shall equal at least fifty per cent of the paid-up capital stock.

"(2) Dividends at a rate not to exceed eight per cent per annum, may, in the discretion of the directors, be declared upon the paid-up capital stock. Five per cent may be set aside for educational purposes.

"(3) The remainder of such net earnings and profits shall be apportioned and paid to its members ratably upon the amounts of products sold to the corporation by its members, and the amounts of the purchases of members from the corporation provided, that if the by-laws of the corporation shall so provide, the directors may apportion such earnings and profits in part to non-members upon the amounts of their purchases and sales from or to the corporation."

Section 5651, C. O. S. 1921:

"Use of Word 'Co-operative.' No person, firm or association, nor any corporation other than such as shall be organized under this Act, shall make use of the word 'Co-operative' in the name under which its or their business is carried on. Whoever shall violate the provisions of this Act shall be punishable by fine of not exceeding one hundred dollars for each offense. The violation of this section may furthermore be enjoined at the suit of any citizen of the State."

Section 5652, C. O. S. 1921:

"Forfeiture of Charter. Any corporation organized under this Act, which fails to comply with all the provisions of this Act, shall thereby forfeit its charter, and the Secretary of State is hereby authorized and directed to recall the charter of any such corporation."